



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: NOVEMBER 22, 2022

IN THE MATTER OF:

Appeal Board No. 624955

PRESENT: RANDALL T. DOUGLAS, MEMBER

The Department of Labor issued the initial determination disqualifying the claimant from receiving benefits, effective March 24, 2022, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to March 24, 2022 cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant and on behalf of the employer. By decision filed July 14, 2022 (), the Administrative Law Judge overruled the initial determination.

The employer appealed the Judge's decision to the Appeal Board.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant worked for a doctor's office from October 2010 through March 23, 2022, ending in the full-time position of office manager. The employer has a policy requiring staff to provide the doctor as much advance notice as possible before taking any time off.

In October 2021, the claimant was late opening the office, as she had been before. The doctor also was late because of traffic that day, and a patient was left waiting outside. The doctor told the claimant to consider taking several years off until the claimant's child started school and she would be

able to arrive on time. The doctor adjusted the claimant's schedule to match the claimant's availability. The doctor did not speak to the claimant again about her time and attendance until after the final incident.

The doctor is also the claimant's primary care physician, and the doctor ordered an ultrasound for the claimant. The claimant had trouble getting the ultrasound scheduled. She succeeded at getting an appointment for March 24, 2022, at 9:30 AM. The appointment was at a considerable distance from the doctor's office. The claimant told the doctor about the appointment. The claimant did not ask for the day off. The doctor did not say whether the claimant had to come to the office or call the office after the procedure.

The claimant went home after her ultrasound on March 24. She did not report for work. On Friday, March 25, the doctor called the claimant and told her not to return on Monday. The doctor fired the claimant for not notifying the employer that she would not be reporting to work after her ultrasound.

OPINION: The credible evidence establishes that the employer discharged the claimant for not notifying the employer that she would not be reporting to work after her ultrasound on March 24, 2022. Significantly, however, the claimant informed the doctor of her ultrasound appointment, and neither the claimant nor the doctor articulated their expectations with respect to whether the claimant would work or go home once her appointment was over. The claimant had no prior, relevant warnings, as the October 2021 incident involved lateness and not a failure to notify the employer of an absence following a scheduled appointment. On the record before us, we find that the claimant was not on notice that she was jeopardizing her job. Rather, the claimant lost her employment as a result of a mutual misunderstanding, as the doctor wrongly assumed that the claimant would be reporting to work, and the claimant wrongly assumed that she had the day off. For purposes of the Unemployment Insurance Law, the claimant's actions do not rise to the level of misconduct. To the extent that the employer raises new factual contentions on appeal that were not presented at the hearing, these contentions are not properly before us, and we do not consider them. Accordingly, we conclude that the claimant's employment ended under circumstances that are non-disqualifying, and the claimant is allowed benefits.

DECISION: The decision of the Administrative Law Judge is affirmed.

The initial determination, disqualifying the claimant from receiving benefits,

effective March 24, 2022, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to March 24, 2022 cannot be used toward the establishment of a claim for benefits, is overruled.

The claimant is allowed benefits with respect to the issues decided herein.

RANDALL T. DOUGLAS, MEMBER